Public Prosecutor v Lee Jun Ho & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–46 OF 2003
APANDI ALI J
30 DECEMBER 2008

Criminal Law — Penal Code — s 302 — Murder — Three accused jointly charged with committing murder while two still at large — Common intention — Whether proven — Issues of evidence — Cumulative effect of circumstantial evidence — Whether circumstantial evidence, when taken as whole, gave rise to irresistible conclusion that accused persons committed offence of murder — Whether safe to convict accused persons

Criminal Procedure — Prosecution — Prima facie case — Close of prosecution's case — Maximum evaluation of evidence — Whether prosecution made out prima facie case — Standard of proof — Criminal Procedure Code s 180(2)

Evidence — Statement — Statements of witnesses not called — Condition precedent in s 32(1) of the Evidence Act 1950 — Maker could not be found — Whether diligent search and reasonable exertion made to procure witness's attendance — Unsuccessful casual attempts by police to locate and produce two witnesses — Whether prosecution's application to admit statements should be allowed — Whether prerequisites of s 32 complied with

The three accused persons were jointly tried for murder under s 302 read together with s 34 of the Penal Code ('Code'). In the course of the trial, the prosecution had, pursuant to s 32(1) of the Evidence Act 1950 ('the Act'), attempted to tender two statements recorded from two witnesses, namely Vasudevan s/o Perumal Chelladurai ('first witness') and Vellaichamy Sockkalingam ('second witness'), Indian nationals. Both the witnesses, who were employed at Klinik Arinaga, were eye-witnesses as to what transpired during the robbery at the clinic. The first witness was injured in the robbery and his statement was recorded by the police while he was still in hospital on 9 June 2003. The statement of the second witness was recorded by the police on 8 May 2003. The investigating officer, PW20, had only made efforts to trace these eye-witnesses after receiving a letter from the AG's Chambers dated 5 November 2007 for purposes of continued hearing of this trial, which was then scheduled on 12–14 March 2008. Prior to that there was no action

taken to trace these witnesses, despite the fact that this case commenced by way of trial, before another judge, on 18 April 2006. The accused persons objected to the application on the grounds that there had been a failure to comply with the prerequisites of s 32 of the Act.

Held, acquitting and discharging the accused persons without calling for defence:

(1) The importance of the two witnesses must have been realised after the s 112 statements were recorded from them, sometime in the middle of 2003. Actions to trace these foreigners were only taken in 2008, while in the midst of the trial. Such action, taken five years after recording their statements, was obviously taken at the eleventh hour. It was most unreasonable, in the circumstances, particularly so in a case under s 302 of the Code. Surely, it was legitimate for the court to expect greater efforts to be made to secure the attendance of such relevant witnesses in such a serious charge. The gravity of the case demanded greater efforts (see para 12(ix)).

(2) The police had failed to take all reasonably practicable steps to trace the witnesses. In fact there was not a single proactive effort by the police to procure the attendance of such material, relevant and important eye-witnesses (see para 14).

(3) There was no attempt to fully utilise the prevailing and available provisions of the Criminal Procedure Code ('CPC'), in order to secure the attendance of the witnesses. The police failed to invoke the provisions of ss 47 and 49 of the CPC which empowers the court to issue a warrant in lieu of or in addition to summon a witness and to require that person to execute a bond for his appearance in court. The police also failed to invoke the provisions of s 118(1) of the CPC whereby the police officer who desires any person, who is acquainted with the circumstances of a case, to be present in court, shall require that person to execute a bond to appear at the trial court. The prosecution also failed to utilise the provision of s 396 of the CPC whereby the public prosecutor may apply to court for any witness of any sizeable offence that intends to leave Malaysia and that witness's presence at the trial to give evidence is fatal for the trial, to be committed to the civil prison until trial or until he shall give satisfactory security that he will give evidence at the trial (see para 15).

(4) It was most unfortunate for the learned deputy public prosecutor that the two important witnesses who were present at the clinic at the material time, could not be called to throw better light onto the prosecution's case. This misfortune was further compounded by the

police's failure to take all reasonably practicable steps to trace them in their efforts to ensure their attendance in court that could have qualified their statements to be admitted as evidence under s 32(1) of the Act. In the circumstances, at the end of the prosecution's case the court was left with various doubts. Further it was not for the defence to fill up the gaps or to clear the doubts in the prosecution's case (see para 29).

[Bahasa Malaysia summary

Tiga orang tertuduh telah dibicarakan bersama atas kesalahan membunuh di bawah s 302 dibaca bersama dengan s 34 Kanun Keseksaan ('Kanun'). Semasa perbicaraan, pendakwaan telah, berdasarkan s 32(1) Akta Keterangan 1950 ('Akta'), cuba mengemukakan dua kenyataan yang direkodkan daripada dua orang saksi, iaitu Vasudevan a/l Perumal Chelladurai ('saksi pertama') dan Vellachamy Sockkalingam ('saksi kedua'), kedua-duanya warganegara India. Kedua-dua saksi, yang bekerja di Klinik Arinaga, adalah saksi yang melihat sendiri berkenaan dengan apa yang berlaku semasa rompakan di klinik tersebut. Saksi pertama telah cedera semasa rompakan dan kenyataannya telah direkodkan semasa dia masih berada di hospital pada 9 Jun 2003. Kenyataan saksi kedua direkodkan oleh polis pada 8 Mei 2003. Pegawai penyiasat, PW20, hanya berusaha untuk mengesan saksi-saksi ini selepas menerima surat daripada Pejabat Peguam Negara bertarikh 5 November 2007 bagi tujuan meneruskan pendengaran perbicaraan ini, yang kemudiannya telah dijadualkan pada 12–14 Mac 2008. Sebelum itu tiada sebarang tindakan diambil bagi mengesan saksi-saksi ini, walaupun kes ini telahpun dimulakan melalui perbicaraan, di hadapan hakim yang lain, pada 18 April 2006. Tertuduh membantah kepada permohonan atas alasan bahawa terdapat kegagalan pematuhan terhadap prasyarat dalam s 32 Akta tersebut.

Diputuskan, membebaskan dan melepaskan tertuduh-tertuduh tanpa memanggil pembelaan:

(1) Pentingnya kedua-dua saksi sepatutnya disedari selepas kenyataan-kenyataan s 112 direkodkan daripada mereka, sekitar pertengahan tahun 2003. Tindakan-tindakan untuk mengesan orang-orang luar negara ini hanya dilakukan pada tahun 2008, semasa pertengahan proses perbicaraan. Tindakan tersebut, mengambil masa lima tahun selepas merekodkan kenyataan-kenyataan mereka, adalah secara jelas dibuat dalam saat-saat akhir. Ia adalah sangat tidak munasabah, dalam keadaan, khususnya dalam kes s 302 Kanun. Sudah pasti, ia adalah dibolehkan bagi mahkamah mengharapkan usaha-usaha yang lebih gigih dibuat bagi memastikan kehadiran saksi-saksi

berkenaan dalam suatu pertuduhan yang berat. Keberatan sesuatu kes memerlukan usaha-usaha yang lebih gigih lagi (lihat perenggan 12(ix)).

(2) Pihak polis telah gagal mengambil langkah-langkah pelaksanaan yang munasabah bagi mengesan saksi-saksi. Sebenarnya tiada satu pun usaha yang proaktif oleh pihak polis bagi memastikan kehadiran saksi yang melihat sendiri kejadian yang material, relevan dan penting (lihat perenggan 14).

(3) Tiada cubaan bagi menggunakan sepenuhnya peruntukan-peruntukan yang wujud dan ada dalam Kanun Prosedur Jenayah ('KPJ'), bagi memastikan kehadiran saksi-saksi. Pihak polis telah gagal mengguna pakai peruntukan ss 47 dan 49 KPJ yang memberikan kuasa kepada mahkamah mengeluarkan waran sebagai ganti atau sebagai tambahan bagi memanggil saksi dan memastikan seseorang melaksanakan satu bon bagi kehadirannya di mahkamah. Polis juga gagal mengguna pakai peruntukan s 118(1) KPJ di mana seorang pegawai polis yang inginkan seseorang, yang mengetahui keadaan-keadaan sesuatu kes, untuk hadir di mahkamah, memerlukan seseorang itu melaksanakan satu bon untuk kehadiran semasa perbicaraan mahkamah. Pendakwaan juga gagal menggunakan sepenuhnya peruntukan s 396 KAJ yang mana pendakwa raya boleh memohon kepada mahkamah bagi mana-mana saksi kepada kesalahan agak besar yang berhasrat meninggalkan Malaysia dan kehadiran saksi tersebut semasa perbicaraan bagi memberi keterangan adalah penting untuk perbicaraan, akan disabitkan ke penjara sivil sehingga perbicaraan atau sehingga beliau memberikan jaminan yang memuaskan bahawa beliau akan memberi keterangan semasa perbicaraan (lihat perenggan 15).

(4) Ia adalah amat malang bagi timbalan pendakwa raya yang terpelajar bahawa dua orang saksi yang penting yang berada di klinik pada masa yang material, tidak dapat dipanggil bagi memberikan gambaran yang lebih baik terhadap kes pendakwaan. Nasib malang ini diburukkan pula oleh kegagalan polis mengambil langkah-langkah pelaksanaan yang munasabah bagi mengesan mereka dalam usahanya memastikan kehadiran di mahkamah yang boleh melayakkan keterangan-keterangan mereka diterima pakai sebagai keterangan di bawah s 32(1) Akta. Dalam keadaan ini, di akhir kes pendakwaan mahkamah mendapati terdapat banyak keraguan. Selanjutnya ia bukanlah tugas pembelaan bagi mengisi ruang atau menghilangkan keraguan-keraguan dalam kes pendakwaan (lihat perenggan 29).]

Notes

For cases on prima facie case, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2945–2957.

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.
For cases on statements of witnesses not called, see 7(2)*Mallal's Digest* (4th Ed, 2006 Reissue) paras 2513–2514.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chan Chun Ling & Anor v PP [1956] MLJ 34, CA (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36, FC (refd)
Choo Chang Teik v PP [1991] 3 MLJ 423, SC (refd)
Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Ibrahim v PP [1962] MLJ 235, HC (refd)
Mahbub Shah v Emperor AIR 1945 PC 118 (refd)
Muhamad Safarudin bin Baba & Anor v PP [2002] 4 MLJ 353; [2002] 4 CLJ 210, CA (refd)
Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)
PP v Chow Kam Meng [2001] MLJU 386; [2001] 7 CLJ 387, HC (refd)
PP v Gan Kwong [1997] MLJU 144; [1997] 2 CLJ Supp 433, HC (refd)
PP v Mogan Ayavoo [2004] 3 CLJ 623, HC (refd)
PP v Mohamed Said [1984] 1 MLJ 50, HC (refd)
PP v Mohd Jamil bin Yahya & Anor [1993] 3 MLJ 702; [1994] 1 CLJ 200, HC (refd)
PP v Murugan a/l Subramaniam & Ors [1996] MLJU 610; [1996] 3 AMR 3156, HC (refd)
PP v Norfaizal bin Mat (No 2) [2008] 7 MLJ 792, HC (refd)
Tan Cheng Kooi & Anor v PP [1972] 2 MLJ 115, HC (refd)

Legislation referred to

Criminal Procedure Code ss 47, 49, 118(1), 180(2), 396
Evidence Act 1950 ss 32, 32(1), 112, 114(g)
Penal Code ss 34, 35, 302

Afzainizam Abdul Aziz (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Gooi Soon Seng (Gooi & Azura) for the first accused.
KY Leong (S Sothi, Leong & Partners) for the second accused.
Naran Singh (Naran Singh & Co) for the third accused.

Apandi Ali J:

INTRODUCTION

[1] The three accused persons were jointly tried for murder. The charge against them reads as follows:

Pertuduhan

A Bahawa kamu bersama-sama dua lagi yang masih bebas, pada 21 April 2003, antara pukul 3.30 dan 4.00 pagi, di Pusat Perubatan Arinaga, No. 86, Lorong Maarof, Bangsar Park, dalam daerah Brickfields, Wilayah Persekutuan Kuala Lumpur, dalam meneruskan niat bersama kamu semua telah melakukan kesalahan bunuh dengan menyebabkan kematian Dr Ariaratnam a/l Thuraiayah dan oleh yang demikian itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dibaca bersama seksyen 34 Kanun yang sama.

[2] At the end of the prosecution's case, I found that the prosecution had failed to make out a prima facie case against all the three accused, and hence they were acquitted and discharged, without calling for their defence.

BRIEF FACTS OF THE CASE

[3] In the early morning of 21 April 2003, at about after 2am, PW9, Ping Thiam Huat, a restaurant worker, went upstairs of the first floor of the premises of HSBC Restaurant, which is his dwelling, to sleep. A short while later, PW9 heard a loud scream coming from the direction of Klinik Arinaga, which is located next door to HSBC Restaurant. The clinic is on the ground floor.

[4] Looking through a window, PW9 saw a man covered in blood running out of the clinic. The man is a worker of Klinik Arinaga. PW9 saw two Chinese males chasing the man. One of the Chinese males was armed with a knife. The man fell down, and the armed Chinese man struck him. PW9 spontaneously shouted 'polis!' to scare them off. He then saw a Malay male standing in front of the clinic.

[5] A motorcar with another Chinese male at the wheels, was seen outside of the clinic. Upon hearing the shout by PW9, another male Chinese came out from the clinic. There were all together five males: four Chinese and one Malay. They all got into the motorcar bearing registration No WJT 936, and left the scene.

[6] PW9 then went to the clinic and saw blood on the floor at the entrance. Fear took over him and he dare not venture further. He then went straight to the Pondok Polis Bangsar, to report what he saw. He walked to the Pondok Polis Bangsar. Upon arrival at the Pondok Polis, he was told by the police that they have been informed of the robbery at the clinic by a phone call. PW9 was not the one who made the call.

[7] Soon later, at about 5.30am, the police arrived at the scene. The forensic unit came at about 6.30am. Next day, in the early morning of 22 April 2003, the police managed to trace the motorcar WJT 936, said to be seen at the

crime scene, as described by PW9. The motorcar was recovered from the house of Norhaizan, PW10. The motorcar was then taken to the Police Contingent, Kuala Lumpur for examination. Upon examination, traces of human blood were found in various places in the car.

[8] Further investigations led to the arrest of the three accused persons, in the following manner: OKT1, Lee Jun Ho surrendered himself to the police on 27 April 2003; OKT2, Choy Chin Chuan was arrested on 4 May 2003; and OKT3, Nor Adzlan surrendered himself to the police, on 5 May 2003. The other two males, who were also seen at the crime scene, were still at large.

RULING ON STATEMENTS OF WITNESSES WHO CANNOT BE CALLED

[9] In the course of the trial, the prosecution attempted to tender two statements recorded from two witnesses, namely Vasudevan s/o Perumal Chelladurai and Vellaichamy Sockkalingam. For purposes of identifications the statements were marked as ID66 and, ID67 respectively. The prosecution's application to tender the witnesses' statements as evidence was made under the provisions of s 32(1) of the Evidence Act 1950; ie on the basis that the witnesses cannot be found.

[10] Learned counsel for all the accused objected to the application on the grounds that there has been a failure to comply with the prerequisites of s 32 of the Evidence Act 1950.

[11] After hearing all the evidence in the prosecution's case, and upon hearing submissions by all parties, but before making a decision at the end of the prosecution's case, the court made a ruling on this matter.

[12] Before that, I made the following findings:

(i) both witnesses are Indian nationals and both came to Malaysia, using Indian passports;

(ii) both of them are workers at Klinik Arinaga and were present during the robbery incident on 21 April 2003;

(iii) the first witness, Vasudevan s/o Perumal Chelladurai was the one who was injured in the robbery and his statement (ID66) was recorded by police while he was still in hospital on 9 June 2003. The investigating officer visited the witness, much earlier on 5 May 2003;

(iv) the second witness, Vellaichamy Sockkalingam, was also a worker of

A Klinik Arinaga, and his statement (ID67) was recorded by police on 8 May 2003, on subsequently a further statement was recorded on 10 October 2003.

(v) both witnesses are eye-witnesses as to what transpired during the B robbery at the clinic;

(vi) the investigating officer, PW20, DSP Rosly bin Hassn only made efforts to trace these eye-witnesses after receiving a letter from the AG's Chambers dated 5 November 2007 for purposes of continued hearing of this trial, which was then scheduled on 12–14 March 2008. Prior to C that there was no action taken to trace these witnesses, despite the fact that this case commenced with trial, before another judge, way back on 18 April 2006;

(vii) the investigating officer seeks the assistance of the Interpol Section at Bukit Aman on 16 January 2008 and then only on 5 February 2008 the D relevant information were faxed to their counterpart in New Delhi, India;

(viii) the investigating officer later seeks the assistance of the Immigration Department, through a letter, sent on 4 July 2008; and

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(ix) it is clear that, the importance of the two witnesses must have been realised after the s 112 statements were recorded from them, sometime in the middle of year 2003. Actions to trace these foreigners were only taken in year 2008, while in the midst of the trial. Such action, taken F *five years after* recording their statements, is obviously taken at the eleventh hour. It is most unreasonable, in the circumstances, particularly so in a case under s 302 of the Penal Code. Surely, it is legitimate for the court to expect greater efforts to be made to secure the attendance of such relevant witnesses in such a serious charge. The G gravity of the case demands greater efforts.

[13] Section 32 of the Evidence Act 1950 is an exception to the general rule that hearsay evidence is inadmissible. Under s 32(1) of the Act, one of the circumstances under which such a statement becomes admissible is where the H person who made the statement 'cannot be found'. This was the basis upon which the prosecution tried to invoke when they attempted to produce and tender ID66 and ID67. For a witness to be clothed as 'who cannot be found' within the meaning of s 32(1) of the Evidence Act 1950, such determination is a finding of fact, of which the onus is upon the prosecution to prove.

I

[14] From facts adduced, I find that the police has failed to take all reasonably practicable steps to trace the witnesses. In fact there was not a single proactive effort by the police to procure the attendance of such material, relevant and important eye-witnesses.

[15] There was no attempt to fully utilise the prevailing and available provisions of the Criminal Procedure Code, in order to secure the attendance of the witnesses. The police failed to invoke the provisions of ss 47 and 49 of the Criminal Procedure Code; which empowers the court to issue a warrant in lieu of or in addition to summon a witness and to require that person to execute a bond for his appearance in court. The police also failed to invoke the provisions of s 118(1) of the Criminal Procedure Code whereby the police officer who desires any person, who is acquainted with the circumstances of a case, to be present in court, shall require that person to execute a bond to appear at the trial court. The prosecution also failed to utilise the provisions of s 396 of the Criminal Procedure Code whereby the public prosecutor may apply to court for any witness of any sizeable offence that intends to leave Malaysia and that witness's presence at the trial to give evidence is fatal for the trial, to be committed to the civil prison until trial or until he shall give satisfactory security that he will give evidence at the trial.

[16] I recalled, as a deputy public prosecutor for the states of Kelantan/Trengganu in the late 1970s, at the height of the Vietnam War, when there was an influx of refugees from Vietnam into Malaysia, there were many serious sizeable offences committed by the refugees. Important witnesses for such offences also involved Vietnamese refugees. On my advise, the police then, did not hesitate to seek recourse to the provisions of s 396 of the Criminal Procedure Code, in order to ensure the attendance of such witnesses at the criminal trials. The law is the same today. These legal provisions are available, to be utilised in such circumstances as in this case.

[17] In view of the above circumstances especially of the omissions by the police to take all reasonably practicable steps in tracing the witnesses, and guided by the following cases (on s 32(1) of the Evidence Act):

(i) *Public Prosecutor v Mohamed Said* [1984] 1 MLJ 50;

(ii) *Public Prosecutor v Mohd Jamil bin Yahya & Anor* [1993] 3 MLJ 702; [1994] 1 CLJ 200;

(iii) *Public Prosecutor v Gan Kwong* [1997] MLJU 144; [1997] 2 CLJ Supp 433;

(iv) *Public Prosecutor v Chow Kam Meng* [2001] MLJU 386; [2001] 7 CLJ 387;

(v) *Public Prosecutor v Mogan Ayavoo* [2004] 3 CLJ 623; and

(vi) *Public Prosecutor v Norfaizal bin Mat (No 2)* [2008] 7 MLJ 792.

[18] I hold that the prosecution has failed to meet the requirements and the prerequisites of s 32(1) of the Evidence Act 1950. I accordingly ruled that the

A statements, ID66 and ID67 are inadmissible, as evidence for the prosecution.

THE PROSECUTION'S CASE

B **[19]** With the ruling against the admissibility of ID66 and ID67, there was no direct evidence adduced to prove the charge against the three accused. The prosecution relied solely on circumstantial evidence. As earlier narrated by PW9, Ping Thiam Huat, five male persons were seen near the vicinity of the Klinik Arinaga. The three accused were charged with two other persons who C are still at large. From evidence adduced, the two still at large are Wai San and Oliver.

[20] The case that was unfolded before the court is very sketchy. The three accused were charged with committing murder, jointly with the two still at D large and the prosecution invoked s 34 of the Penal Code as the common intention element. One of the issues before the court is therefore, is there a common intention to commit the offence of murder? Is the hatching of a pre-arranged plan credible and clear to indicate such common intention?

E **[21]** The only witness that was called to prove the element of common intention was PW17, Chin Yew Eng. In his evidence, PW17 told of a conversation to rob the clinic of drugs; this can be seen at p 185 of the notes of evidence. PW17 also stated that OKT1 then took out three parangs, similar to exh P22B that was recovered at the clinic. F

[22] Under cross-examination, PW17 stated that during the alleged conversation of the plan to rob, three other persons named Aeron, Alex and Game were present (see p 191 of the notes of evidence).

G **[23]** It is noted that the said three persons who were present during the alleged conversation of the plan were not called to give evidence or even make available for the defence. In view of suggestions made about the alleged conversation during the cross-examination of PW17, the calling or making H available of the said three witnesses is essential in the circumstances. Failure to do, would inevitably trigger the adverse presumption under s 114(g) of the Evidence Act 1950.

[24] PW17 also told the court that after the incident at the clinic, OKT1 I told him that 'they hurt the doctor and the staff' and narrated further that 'Oliver started slashing the doctor and Wai San slashed the staff', (see p 188 of the notes of evidence). Are these actions by the two still at large, Oliver and Wai San, can be accepted as actions in furtherance of a common intention, to commit murder? It is not clear.

[25] On the weapon used, although it was said that three parangs were shown, only one parang (exh P22B) was recovered. There were no fingerprints on P22B. As narrated by PW17, the three parangs were shown at the hotel. One parang was seen, by PW9, to be in the hands of the assailant who chased the clinic worker outside the clinic and one parang was recovered inside the clinic. Is the parang (exh P22B) the actual murder weapon? Who handled the parangs at the time of the robbery, at the clinic remained unclear. There is no evidence to show or indicate if any of the three accused were armed with the parangs at the time they went to the clinic.

[26] The prosecution in this case elected to use s 34 of the Penal Code, in order to prove common intention. Section 34 speaks of '… in furtherance of common intention'. Case law that explained of such requirement of a pre-arranged plan or a meeting of the minds to commit the common criminal act can be seen in:

(i) *Mahbub Shah v Emperor* AIR 1945 PC 118;

(ii) *Chan Chun Ling & Anor v Public Prosecutor* [1956] MLJ 34;

(iii)
(iv) *Tan Cheng Kooi & Anor v Public Prosecutor* [1972] 2 MLJ 115;

(v) *Choo Chang Teik v Public Prosecutor* [1991] 3 MLJ 423;

(vi) *Public Prosecutor v Murugan a/l Subramaniam & Ors* [1996] MLJU 610; [1996] 3 AMR 3156;

(vii) *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232;

(viii) *Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; and

(ix) *Muhamad Safarudin bin Baba & Anor v Public Prosecutor* [2002] 4 MLJ 353; [2002] 4 CLJ 210.

[27] From facts adduced and the circumstances of the case, I find that there is insufficient evidence to infer that there existed common intention within the meaning of s 34 of the Penal Code. It would probably be a different ball game, if s 35 of the Penal Code was invoked by the prosecution. Section 35 speaks of knowledge or intention and need not necessarily be common intention, when the act is done by several persons.

CONCLUSION

[28] At the end of the prosecution's case, the learned deputy public prosecutor conceded that he is relying on circumstantial evidence to prove his case. To prove a criminal case based on circumstantial evidence is admittedly an uphill task for any deputy public prosecutor. In this case, such

circumstantial evidence, taken as a whole, must give rise to an irresistible conclusion that the three accused persons committed the offence of murder (see case of *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36).

[29] I sympathised with the learned deputy public prosecutor for having the difficult task to prove common intention and the acts in furtherance of such common intention, without the benefit of direct evidence of eye-witnesses. It is most unfortunate for the learned deputy public prosecutor that the two important witnesses, Vasudavan and Vellaichamy, who were present at the clinic at the material time, could not be called to throw better light onto the prosecution's case. This misfortune is further compounded by the police's failure to take all reasonably practicable steps to trace them in their efforts to ensure their attendance in court, that could have qualified their statements to be admitted as evidence under s 32(1) of the Evidence Act. In the circumstances, at the end of the prosecution's case the court is left with various doubts, as indicated above.

[30] Furthermore, it is not safe to convict the accused persons, when such evidence is not clear and credible, in the event the accused persons elect to remain silent (see the case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85). And, I must add, it is not for the defence to fill up the gaps or to clear the doubts in the prosecution's case (see the case of *Ibrahim v Public Prosecutor* [1962] MLJ 235).

[31] In conclusion, I find that, at the end of the prosecution's case, the prosecution has not made out a prima facie case against all the three accused persons; and in accordance with the provisions of s 180(2) of the Criminal Procedure Code, all the three accused persons are acquitted and discharged.

Accused persons acquitted and discharged.

Reported by Ashgar Ali Ali Mohamed